Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 5, 1992

Mr. Allen P. Beinke, Jr.
Executive Director
Texas Water Commission
P. O. Box 13087 Capitol Station
Austin, Texas 78711-3087

OR92-301

Dear Mr. Beinke:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 12644.

The Texas Water Commission (the "commission") received an open records request for schedules of "cost and price data" pertaining to the current contract between the commission and Ebasco Environmental (Ebasco). The requested documents (Exhibit C and Attachment III to Exhibit C) were exhibits and attachments for a contract to conduct an investigation into and design the engineering necessary for the clean up of leaking underground storage tanks. You have requested an open records decision pursuant to section 7(c) of the Open Records Act as to whether the documents must be withheld. This office subsequently notified representatives of Ebasco the open records request and sought their contentions regarding the proprietary nature of the information.

You direct our attention to article 28 of the contract between the commission and Ebasco, which provides

> All data and information developed under [the contract] shall be public data and information, and shall be furnished to TWC. Upon termination of this Agreement, all data and information shall become the property of TWC . . . .

You appear to suggest that article 28 of the contract makes Exhibit C public and so estoppes Ebasco from asserting any proprietary interest in this information. Ebasco representatives, however, contend that article 28 does not reach Exhibit C because

its cost and pricing information was not developed "under" the contract but was in fact developed long before the contract was executed. Because we cannot resolve differing interpretations of contracts in the opinion process, our determination as to whether this information is public must in this instance be based solely on Ebasco's demonstration that the information falls within exceptions to required public disclosure under the Open Records Act.

Ebasco contends that the cost and pricing data comes under the protection of sections 3(a)(4) and 3(a)(10) of the Open Records Act. Section 3(a)(4) of the Open Records Act protects from required public disclosure "information which, if released, would give advantage to competitors or bidders." For example, section 3(a)(4) is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. Because section 3(a)(4) is intended to protect the *governmental* interests, a third party such as Ebasco lacks standing to assert this exception. Accordingly, we cannot consider Ebasco's claims with regard to this exception.

On the other hand, section 3(a)(10) is intended to protect the proprietary interests of third parties. Section 3(a)(10) protects:

> trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

The Ebasco representatives contend that the pricing information is a trade secret. A "trade secret" is

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex. 1958) (quoting RESTATEMENT OF TORTS § 757 cmt. b (1939)); *see also* Open Records Decision Nos. 255 (1980); 232 (1979); 217 (1978). There are six factors to be assessed in determining whether

information qualifies as a trade secret. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979).

Ebasco has taken steps to demonstrate how the six factors apply to all of Exhibit C and Attachment III to Exhibit C, and we believe that the company has made a *prima facie* case that the information contains trade secrets. Specifically, Ebasco has made strong arguments that company policy restricts dissemination of the information within the company as well as outside of it, and that the cost proposals reflect the great deal of time and research that was spent in their development. *See* Open Records Decision No. 552 (1990). Although Open Records Decision No. 306 ruled that a company's pricing information and cost proposals would not constitute trade secrets, significantly, the company had made no argument that they did. Open Records Decision No. 306 (1982); *cf.* Open Records Decision No. 541 (1990) at 7 (obligation to demonstrate information is a trade secret within section 3(a)(10)). Moreover, Open Records Decision No. 541 found that a city had successfully made a case that certain pricing information in a coal contract should be withheld as a trade secret under section 3(a)(10). Determinations about the application of section 3(a)(10) must always be made on a case-by-case basis.

We distinguish this case from the one dealt with in Open Records Decision No. 592 (1991). That opinion found that a hospital chargemaster list (a list of the prices charged by a hospital for goods and services) was not protected as a trade secret. Noting that the "charge for an item is subject to disclosure every time that item is provided or proposed to be provided" by a hospital to an individual, the opinion reasoned that the price information could not be a "secret" within the definition of a trade secret. In the case of hospital charges, price information is routinely distributed to a large portion of the general public. Moreover, the hospitals had not effectively argued that the information was secret. Neither of these conditions obtain in Ebasco's case. We conclude that Exhibit C and Attachment III to Exhibit C are excepted from disclosure under section 3(a)(10).[1]

---

[1]We note that article 5(f)2 of the contract provides that Exhibit C is incorporated into, and so made a part of, the contract between the commission and Ebasco and that article 6(a) of the contract provides that Ebasco must submit to the commission "itemized invoices requesting payment [for its services] in detail sufficient for audit." Section 6 of the Open Records Act provides in pertinent part:

> Without limiting the meaning of other sections of this Act, the following categories of information are specifically made public information:
>
> (1) reports, audits, evaluations, and investigations made of, for, or by, governmental bodies upon completion;

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR92-301.

Yours very truly,

Faith Steinberg
Assistant Attorney General
Opinion Committee

FS/RWP/lmm

Ref.: ID# 12644
ID# 12930
ID# 12940
ID# 13231
ID# 13363
ID# 13382

(footnote continued)

. . .

(3) information in any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by governmental bodies, not otherwise made confidential by law.

There is a long-standing public policy that governmental bodies' financial records be available to the public. *See* Open Records Decision No. 233 (1980) (and authorities cited therein). Section 6 reflects the legislative intent that information regarding the receipt or expenditure of public funds should ordinarily be available to the public. Although section 6 of the act does not override the exceptions listed in section 3(a), it does at a minimum heighten the burden of proof that information is excepted from required public disclosure. Open Records Decision No. 518 (1989) at 7. We therefore caution that our determination applies only to the actual documents before us, and is based on the specific arguments made by Ebasco about the application of the trade secret definition to those materials.

cc: Ms. Renee Davidson
Agency Information Consultants, Inc.
P. O. Box 2181
Austin, Texas 78768-2181

Mr. Scott F. Stains
Attorney at Law
Suite 840 Enserch Center
300 S. St. Paul
Dallas, Texas 75201